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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF TEXAS, INC., IN SUPPORT OF PETITIONERS' PETITION FOR DISCRETIONARY REVIEW

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

ACLU of Texas, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the ACLU of Texas, Inc. in this case arises from the fact that, in addition to our institutional concern with the Court's interpretation of fundamental liberties, many of our clients and those simply making inquiries about possible civil rights violations have reported similar instances to the facts in this case. The resolution of this case will have a direct impact on the people we seek to serve.

The *amicus curiae* is requesting to file a brief that will discuss the broader policy implications of allowing the current ruling of the Court of Appeals to stand and to draw the court's attention to general facts beyond the instant case.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union of Texas (ACLU-TX) is a non-profit membership organization incorporated in the State of Texas with approximately 8,000 members. It is affiliated with the American Civil Liberties Union headquartered in New York, NY and through the national organization with 53 other ACLU affiliates in the United States with a total membership of 275,000 members. The ACLU-TX is a membership organization with a 501(c)(4) tax status. Membership dues to the ACLU are not tax exempt. It is affiliated with the ACLU Foundation of Texas (Foundation) which is a tax exempt 501(c)(3) organization.

The ACLU-TX is dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU-TX provides legal services through cooperating attorneys acting on a pro bono basis to persons whose liberties have been violated, as well as educating the public on matters involving civil liberties and civil rights. The ACLU-TX is primarily involved in "impact" litigation to correct systemic violations of civil liberties.

The ACLU-TX has specific and direct interest in this litigation not only on behalf of its membership but also on behalf of the significant number of people who seek ACLU assistance involving situations that present facts not unlike the instant case. In the course of a year the

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[1] This brief is made upon motion. Pursuant to Rule 37.6 counsel for amicus state that no counsel for a party authored this brief in whole or in part and no person other than amicus made a monetary contribution to the preparation or submission of this brief.

ACLU-TX receives nearly 6,000 requests for assistance, a significant portion of which involve questions of alleged police misconduct. The interest of the people that the ACLU-TX represents and counsels is directly and adversely affected by the decision below.

SUMMARY OF ARGUMENT

The common thread of American political theory is that government is, or ought to be, limited and restrained from unreasonably imposing restraints upon its citizens' liberties. The entire body of law relating to individual liberties seeks to find the balance between what is necessary for the proper functioning of society and the maximum freedom possible for the individual.

This notion is tested daily in applying the Fourth Amendment's prohibition against unreasonable seizures of person or property. That government necessarily must sometimes intrude on our lives does not mean that we grant carte blanche approval of unreasonable actions. We have traditionally given the greatest weight to protecting public and private intrusions into the home under the general "right to be left alone." But that right extends, albeit to a lesser degree, beyond the portals of the home. Unreasonable and unjustified detention of the person by police violates this basic right.

The Fourth Amendment frees us from unreasonable searches and seizures. It should be our protection from abusive and harassing governmental conduct. It ought to shield a woman driving with two small children from fear that a minor traffic infraction will result in her being

booked as a criminal and confined in jail until she can be presented to a magistrate.

That police feel free to behave the way Officer Turek did in the instant case is the result of police everywhere believing that this Court sanctions such practices. The line of cases that permit searches incident to an arrest for a minor traffic infraction has led both the police and the majority of the Fifth Circuit to believe that it is acceptable for the police to treat a minor traffic offense as a more serious crime depending upon the whim of the arresting officer.

Because the answer to the question of whether or not the police can incarcerate a person for a minor infraction is critical to every person in this country, this Court should grant certiorari.

ARGUMENT

I. The facts of this case involve such an important Constitutional question of overarching national significance that the Court should grant certiorari to set national standards.

Without question, the most significant and frequent contact the average American has with the police is being stopped for a traffic infraction. It would be difficult to find anyone, other than a neophyte driver, who has not been stopped and given a citation for some traffic offense. The ramifications of the ruling in this case will be felt by millions of people in their ordinary daily life. If allowed to stand, the ruling below signals an open season on

motorists and others who, for whatever reason, displease a police officer.

A. It is unreasonable to permit police to put someone in jail pending a hearing for an offense for which no jail time can be imposed.

We require police to articulate reasons giving rise to probable cause prior to making an arrest or conducting a warrantless search. These decisions are subject to review by a judicial officer. We require a magistrate to have reasons rising to probable cause before issuing a search or arrest warrant, and the law is well-settled that the issuing magistrate may not simply rubber stamp the decision of the police. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964). If we were not concerned that an overzealous officer might abuse his office, the law would be otherwise. It is a reasonable and proper concern.

How is it, then, that the law can allow a police officer to determine that a person should go to jail when the law allows neither judge nor jury, under any circumstances, to incarcerate that person? To be sure, the magistrate will release a person so detained. There is simply no other option. But that does not lessen the humiliation of being handcuffed, fingerprinted, and photographed, and spending as much as two days in jail. Nor will the magistrate's release make up for lost work or a lost holiday.

In the case before the Court, Ms. Atwater was, in some respects, fortunate. She was near enough to her home that a neighbor saw what was happening and was able to take her terrified children for her. She was also fortunate to only spend an hour in jail. Circumstances

could easily have been different. She could have been traveling across country with no friendly neighbor in sight. In many small towns across this state, she may have languished up to forty-eight hours in jail before being released by a magistrate.

This Court has often written about the "right to be left alone" in the context of the privacy of one's own home. *FCC v. Pacifica*, 438 U.S. 726, 748 (1978); *Telecommunications Consortium v. FCC*, 518 U.S. 727, 804 (1996); *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 77 (1983) (Rehnquist, O'Connor concurring); *Carey v. Brown*, 447 U.S. 455, 477 (1980) (Rehnquist dissenting, joined by Chief Justice and Blackmun). These cases accord great weight to the privacy of the home as a place free from unwanted intrusion. To be sure, the home is to be accorded the highest weight. But is it the only place where one has a right to be left alone?

No one would argue that a person guilty of a traffic infraction has a "right to be left alone" by a police officer. This justified intrusion should not give rise to the physical incapacitation and detention of a person. Surely, in a free and just society, one has the right to expect one will not be imprisoned simply because a tail light is out or a seatbelt was not buckled.

It is reasonable to expect to be left alone by police when one's conduct comports with the law. But even when a person's conduct does give rise to a police stop, it is reasonable to expect the officer will not be allowed to incarcerate that person for an offense that does not permit incarceration.

B. The purpose of the Fourth Amendment is to protect all people from unreasonable police behavior and free them from abuse and the fear of abuse.

The expansion of the automobile exception to the Fourth Amendment is well documented in the *amicus* brief of the Texas Criminal Defense Lawyers' Association. "The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule." *Ker v. California*, 374 U.S. 23, 61 (1963) (Brennan, separate opinion joined by The Chief Justice, Douglas, and Goldberg).

The blessings of liberty we enjoy, including freedom from arbitrary and obtrusive governmental action, is due to a vigilant judiciary jealously protective of our fundamental freedoms. As was noted by Justice Harlan;

> Though the preceding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be said that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

If allowed to stand, the decision below will be a precedent that will eviscerate the protection that stands between the ordinary citizen and often overzealous constabulary. As the Father of the Constitution noted:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Memorial and Remonstrance*, James Madison, June 20, 1785.

We are now faced with the "usurped power" Madison warned against. We are faced with the situation in which the judicial efforts to accommodate the needs of law enforcement has accommodated instead the vengeful officer. Who, now, can be free of fear of full custodial arrest for the slightest infraction?

If the Court of Appeals is correct in its interpretation of this Court's rulings, then stepping off a curb to hail a cab can lead to more than a desk appearance ticket. It may be prelude to the humiliation of being fingerprinted, booked and incarcerated. Of course, it is highly doubtful that this will often occur to people with some status in society. Rarely does abusive police conduct target such people. It will be primarily used on the poor, the young, and minorities.

The recent – or rather recently noted – phenomena, of "driving while black" has lead to a spate of lawsuits providing more insight into police behavior. In a survey conducted by John Lambert, Ph.D. for just such a suit, it was shown that in forty-two hours of observations on I-95 in Maryland, 93% of the 5,741 observed drivers were violating some traffic law, thus subject to arrest. 17.5% of the observed drivers were African-American. Yet the records of the Maryland State Police (MSP) showed that of motorists stopped for traffic infractions and searched along this corridor, 72% were black. It should also be noted that contraband was recovered in only 28.4% of black motorists searched, and 28.8% of white motorists[2] disproving any validity of the common practice of racial profiling.

These statistics are really not startling. Many people expected that any survey would turn up such results.[3]

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[2] John Lamberth, *Report of John Lamberth, Ph.D.*, Nov. 8, 1996. Expert witness report for plaintiff in *Wilkins v. Maryland State Police*, Civil Action No. CCB-93-483, U.S. District Court for the District of Maryland. *See also*, plaintiff's brief in *Maryland State Conference of NAACP Branches, et al. v. Maryland State Police Civil Action* No. CCB-98-1098. U.S. District Court for the District of Maryland (Northern Division) Dr. Lamberth is the immediate past Chairman of the Department of Psychology and the past Director of the Division of Social Psychology at Temple University in Philadelphia.

[3] "Annual poll Shows That Most People Believe Racial Profiling by Cops Is Common", Jet Magazine, January 10, 2000. Citing a then-recent Gallup poll, the article noted that "more than 40% of Blacks of all ages and both genders said they believe they've been stopped because of their race", "and three-fourths of young Black men say they believe they have been pulled over by police just because they were Black."

The point, unfortunately, is that we can expect many police officers to treat people differently for the wrong reasons. We can expect some police officers with a grudge to improperly use their authority. The possibilities are really limitless. It could be the harassment of a fellow officer's ex-spouse or campaign workers of an incumbent sheriff's opponent or merely someone who is a thorn in the side of the local city council. In fact, it could simply be that the officer got up on the wrong side of the bed. Since this court has already indicated that it will not go into the underlying reasons for an otherwise valid police stop, even personal animosity is not subject to question.

Abusive police behavior has been and will always be with us, but until this decision, it has not had the judicial stamp of approval. This Court is in its usual position of being the last clear chance to contain abusive police behavior. The Fifth Circuit's opinion leaves us with a fundamental right that "consist[s] more in sound than in substance."

C. The correction of a misapplied or misunderstood Constitutional standard that has a far reaching effect is an appropriate reason for this Court to grant certiorari.

This Court has long held that the misapplication of federal standards by a lower court is a valid reason for granting certiorari. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491 (1951); *Mobil Oil Corp. v. Federal Power*

Commission, 417 U.S. 283, 310 (1974), reviewing misapplied federal regulatory standards even though primary responsibility rested with circuit courts of appeals.

It is also recognized by the Court that it will take a close look at the totality of the facts and circumstances in a case involving a potential violation of a fundamental liberty interest.

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment.

Pennekamp v. Florida, 328 U.S. 331, 335 (1948).

The *en banc* opinion does not fairly report or do justice to the facts of this case. The complete facts are found in the dissents to this decision: *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 *et seq.* (5th Cir.1999) and in the panel opinion, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). A fair reading of the facts support neither a routine traffic stop nor a pretext stop to ferret out crime. They support a vindictive officer using his authority to harass and intimidate a young mother and her children. The *en banc* decision straitjackets the facts to make them fit a narrow mold.

> This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application. . . .

Ker, 374 U.S.at 23.

This Court has viewed significant splits in *en banc* decisions on weighty federal questions as a factor in deciding to grant certiorari. *Oil Workers Union v. Mobile Oil Corp.*, 426 U.S. 407, 412 (1976); *Miree v. DeKalb*, 433 U.S. 25, 27 (1977); *Rinaldi v. U.S.*, 434 U.S. 22, 25 (1977); *but see Ratchford v. GayLib*, 434 U.S. 1080 (1977) and *Kimble v. McDuffy*, 454 U.S. 1110 (1981). In this case the Court should be drawn to the adamantine position of the dissent. The instant case presents no mere difference of interpretation of facts based on a mutually accepted standard of law. The difference between the majority and dissenters is profound and fundamental. It is fully appropriate for this Court to settle the issue by granting certiorari.

CONCLUSION

Presenting this Court with a critical Constitutional question that goes to the core of our concept of ordered liberties, the instant case begs for Supreme Court review. Nothing less is at stake than the question of whether or not abusive police behavior is to find a comfortable nesting place as an exception to the general rule of reasonableness found throughout the Fourth Amendment. The ultimate effect of which will be felt by nearly every one in our nation. The policy enunciated by the ruling

below gives unfettered discretion to police officers to decided who among the many they stop for minor infractions will be selected for full-blown custodial arrest and detention. Petitioners' writ for certiorari should be granted to rectify this error.

Respectfully submitted,

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